CEMPAKA FINANCE BHD

v.

FAJAR LODGE SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: D2-22-650-1998]
12 APRIL 2002

CIVIL PROCEDURE: *Adjournment - Counsel unfit for duty - Whether medical certificate produced genuine - Whether sufficient proof of illness furnished*

The senior assistant registrar ('SAR') refused the defendant's counsel for an adjournment of the plaintiff's application for summary judgment. Hence, this appeal.

The issue was whether the defendant's counsel had a valid reason for seeking the adjournment as the SAR had expressed doubt as to the genuineness of the medical certificate certifying his unfitness for duty.

Held:

[1] This court allowed the defendant's counsel to file an affidavit as to his personal circumstances on the day in question so that the facts could be examined closely to decide whether his excuse of being ill was acceptable. The defendant's counsel must, therefore, have known that if his was a genuine case it was crucial that he present the circumstances in such a way as not to give this court cause to doubt his story. (p 747 i)

[2] Faced with the SAR's doubt as to the genuineness of the medical certificate as proof that he was ill, the defendant's counsel had not attempted to reinforce his claim of being ill and neither did he furnish concrete proof of what eventually happened to him on the day in question or subsequently as regards his alleged illness. When this was raised by the plaintiff's counsel in submission, the reply of the defendant's counsel was merely that a medical report was confidential and that he might be suffering from something that he did not wish to disclose. He should have stated so in his affidavit and provided some documentary proof of it without necessarily revealing what the nature of the ailment was. (p 748 a-d)

[3] Another questionable circumstance, although not taken into consideration when arriving at the decision of this court, was the fact that the photocopy of the medical certificate that was sent to the court bore the clearly stamped words of "DR. BAJAN SINGH PJK, MBBS (MYSORE) GENERAL PRACTITIONER" under the signature for the "Medical Practitioner". However, those words did not appear in the photocopy of the medical certificate exhibited to the affidavit of the defendant's counsel. (p 749 d-e)

[Appeal dismissed.]

For the plaintiff - Wong Ming; M/s Zairina Loh & Wong
For the defendants - R Kengadharan; M/s R Kengadharan & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Mohamad J:

This judgment is the sequel to my judgment of 1 December 1999. The only question in this appeal is whether the learned senior assistant registrar ought to have granted the adjournment sought by the defendants' counsel of the hearing of the plaintiffs' application for summary judgment on 18 July 1998. That question depends on the question whether the defendants' counsel had a valid reason for seeking the adjournment.

Let me first repeat what was known to me on 1 December 1999. On 18 July 1998, there was before the senior assistant registrar a medical certificate dated 17 July received from the defendants' counsel, certifying his unfitness for duty on 18 July. The plaintiffs' counsel expressed doubt as to the genuineness of the certificate. In refusing an adjournment, the senior assistant registrar said that he did so after scrutinising the certificate and after getting a telephone call from the defendants' counsel in which he had said that he was telephoning from his office.

On 1 December 1999 I allowed the defendants' counsel to file an affidavit as to his personal circumstances on 17 and 18 July that are relevant to his failure to attend court on 18 July. He has filed the affidavit, the plaintiffs' counsel has filed his in reply, and the defendants' counsel has filed one in reply to that of the plaintiffs' counsel.

This is what the defendants' counsel related in his affidavit. On 17 July 1998, when he returned – to what place is not stated – from the Shah Alam Magistrate's Court after attending a hearing, he felt "kurang sihat" and he went to see "doktor saya yang dikenali sebagai Klinik Bajan", whose clinic was in Petaling Jaya, two doors next to his office. The doctor examined him and

found him "kurang sihat". The doctor asked him to attend the clinic on a fast next day, 18 July, to undergo blood analysis. As he had official business in court on the morning of 18 July, and no further business in court on 17 July, the doctor issued on 17 July medical certificate No. 19236 for 18 July only. A copy of the certificate is exhibited. After arriving back at his office, he thought it was proper to inform the court in writing. A letter dated 17 July addressed to the registrar was prepared requesting a postponement of the hearing on 18 July on grounds of ill health of the defendants' counsel. A copy was forwarded to the plaintiffs' solicitors. The letter to the court with a copy of the medical certificate was forwarded to the senior assistant registrar on 18 July.

As counsel had discharged his obligations, he went home early on 17 July to rest.

He was informed by his office – I take it that he meant while he was resting at home on 17 July – that the plaintiffs' solicitors had replied to his letter requesting a postponement, to say that they had strict instructions to proceed with the hearing on 18 July and to suggest that another solicitor be engaged for the hearing. Referring to his statement that he had gone home early to rest, the defendants' counsel said that he was not able or not in a position to reply to the letter of the plaintiffs' solicitors.

Next day, 18 July, he went back to the clinic for the blood analysis on a fast. The doctor had not yet arrived and he had to wait. As he had a little time, he went to his office "dan mendapati adanya sepucuk surat daripada peguamcara plaintif dan lantas saya telah berhubung dengan penolong kanan pendaftar".

On 21 July, the plaintiffs' solicitors wrote to the office of the defendants' solicitors to say that the court had refused an adjournment. This is what the letter said:

> The Court having considered the facts, was of the view, *inter alia*, that the request for adjournment was not *bona fide*. The Court was not given the original medical certificate. The medical certificate was dated 17/7/98 but the sick leave was given for 18/7/98 only. Further, the Court was not convinced of your Mr. R. Kengadharan's ill health as your Mr. R. Kengadharan was able to telephone the Court from your office on the morning of the said hearing.

That is the narrative of the defendants' counsel.

The defendants' counsel must have known from my allowing him to file an affidavit as to his personal circumstances on 17 and 18 July that I wanted to examine the facts closely to decide whether his excuse of being ill on 18 July is acceptable. He must, therefore, have known that if his was a genuine case it was crucial that he present the circumstances in such a way as not to give me cause to doubt his story.

I am struck immediately by the fact that the defendants' counsel has not related what happened as regards his medical problem after he left the clinic on the morning of 18 July to go to his office. Did he go back to the clinic? Did he undergo the blood analysis? He has left the narrative hanging as though the matter ended with his leaving the clinic before he could see the doctor. Faced with the registrar's doubt as to the genuineness of the certificate as proof that he was ill on 18 July, he has not attempted to reinforce his claim of being ill by completing the narrative of his medical treatment and furnishing concrete proof of what eventually happened to him on that day or subsequently as regards his alleged illness.

When this was raised by the plaintiffs' counsel in submission, the reply of the defendants' counsel was merely that a medical report was confidential and that he might be suffering from something that he did not wish to disclose. But if in fact he was suffering from something – and he did not say in submission that he was – he should have completed the narrative in the affidavit and said so, and provided some documentary proof of it, without necessarily revealing what the nature of the ailment was.

Further, a scrutiny of the contents of his affidavit reveals a glaring inconsistency. It must be remembered that one question that must have been in the mind of the senior assistant registrar, and that would be in anybody else's mind, is this: if the defendants' counsel was ill or not well on 18 July, how was it that he was in his office on the morning of that day to telephone to the senior assistant registrar? After all, according to him, because he was not well he had gone home early on 17 July to rest after settling the matter of the letter to the court seeking an adjournment.

My own understanding of the explanation of the defendants' counsel is that on the morning of 18 July he first went to the clinic. Because the doctor had not arrived, he had a little time, and so he decided to go to his office, which was nearby. He did not say why he needed to go to his office. So his being in the office that morning was just a matter of chance, because he had some time to spare before the doctor arrived at the clinic. When he arrived at the office he "mendapati adanya sepucuk surat daripada peguamcara plaintif dan lantas saya telah berhubung dengan penolong kanan pendaftar". He said it as if that was the first time he knew of the letter. The implication is that had the doctor been present at the clinic to attend to him, he would not have gone to the office, he would not have known of the letter and he would not have telephoned the senior assistant registrar, whether from his office or elsewhere.

But, according to him, he had already known about the letter on 17 July when he was informed about it by his office when he was resting at home. Since he had known about the letter on 17 July, his statement that he telephoned

the senior assistant registrar from the office on the morning of 18 July because he came upon the letter when he happened to go to the office from the clinic cannot be true. It casts doubt on his account about going to the clinic on the morning of 18 July, about the doctor not being there, and about his deciding to go to his office because he had a little time. That, together with his failure to complete the medical aspect of the narrative, casts doubt on the story of his visiting the clinic on 17 July and being told to come next day for a blood analysis.

For those reasons I am not satisfied with his explanation of being ill on 17 and 18 July and I must find that he had no valid reason for seeking an adjournment of the hearing on 18 July and that the senior assistant registrar was right to refuse an adjournment.

I feel I ought to mention another questionable circumstance, although I have not taken that into consideration in arriving at my decision because I am not certain what to make of it. It is a fact that the certificate that was sent to the court was only a photostat copy. I see it attached to the letter of the defendants' counsel at encl. (8) in the court file. Under the signature for the "Medical Practitioner" there appears very clearly in the photostat copy of the certificate the stamped words "Dr. Bajan Singh PJK, MBBS (Mysore) General Practitioner". The original, which must have been in the keeping of the defendants' counsel, must, one would expect, bear those words too. To his affidavit is exhibited a photostat copy of what must be the same original, but for the fact – and this is what creates the mystery – that those words do not appear at all in the copy exhibited.

I have not referred to the contents of the affidavit of the plaintiffs' counsel because it seeks to do two things that I do not think I ought to consider. First, it seeks to show by referring to certain past events relating to the plaintiffs' application for summary judgment, that the application for a postponement on grounds of ill health of the defendants' counsel was a manoeuvre. Secondly, it sets out the plaintiffs' counsel's own past medical experience to argue that if the defendants' counsel was merely "kurang sihat" he should have attended court. Since the apparent reason that the senior assistant registrar had in refusing the adjournment was that he doubted the claim of the defendants' counsel that he was ill, and not that he considered that the illness claimed was not serious enough to disable the defendants' counsel from attending court, I would have found in favour of the defendants' counsel had I been satisfied of the genuineness of his entire explanation which centres on the claim that he was ill on 17 and 18 July.

Since the adjournment was rightly refused, I dismiss this appeal with costs.